

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
LAS VEGAS, NEVADA

KABINS FAMILY LIMITED)
PARTNERSHIP, et al.,) CASE No. 2:09-CV-1125-RCJ-RJJ
)
Plaintiffs,)
)
vs.)
)
CHAIN CONSORTIUM, et al.,)
)
Defendants.) Las Vegas, Nevada
) April 16, 2010
) 11:15 a.m.
And related cases and parties)

HEARING ON MOTIONS

THE HONORABLE ROBERT J. JOHNSTON PRESIDING
MAGISTRATE JUDGE OF THE U.S. DISTRICT COURT

Proceedings recorded by electronic sound recording, transcript
produced by transcription service.

2:09-CV-1125-RCJ-RJJ Kabins v. Chain 4/16/10 **Motions**

NW TRANSCRIPTS, LLC - Nevada Division
P.O. Box 890
Nampa, Idaho 83653-0890
(208) 466-4148 - gayle@nwtranscripts.com

APPEARANCES:

FOR THE PLAINTIFFS:

STEVEN A. GIBSON, Esq.
JOHN SCOTT BURRIS, Esq.
Gibson Lowry Burris, LLP
7201 W. Lake Mead Boulevard
Las Vegas, Nevada 89128
sgibson@gibsonlowry.com
sburris@gibsonlowry.com

Dr. Kabins Personal Attorney
JOHN V. SPILOTRO, Esq.
Spilotro & Kulla
626 S. Third Street
Las Vegas, Nevada 89101

FOR THE DEFENDANTS:

For Cipriani Management, LLC:
HANNAH C. IRSFELD, Esq.
Irsfeld & Associates, LLC.
1700 West Horizon Ridge Parkway
Suite 206
Henderson, Nevada 89012
hirsfeld@irsfeldlaw.com

For 99th & Indian School, LLC:
WILLIAM KERRY SKAGGS, Esq.
Law Office of William Kerry Skaggs
401 N. Buffalo Drive, Suite 100
Las Vegas, Nevada 89145
kerryskaggs@msn.com

For Benessere, LLC, Buckeye
Canamex 77 One, LLC:
CHAD A. BOWERS, Esq.
Law Office of Chad A. Bowers, Ltd.
3202 W. Charleston Blvd.
Las Vegas, Nevada 89102
chadbowers@lawyer.com

1 LAS VEGAS, NEVADA

FRIDAY, APRIL 16, 2010

2 PROCEEDINGS BEGAN AT 11:15:01 A.M.

3 THE COURT: Please be seated.

4 THE CLERK: Kabins Family Limited Partnership, et
5 al, versus Chain Consortium, et al. 2:09-Civil-1125-RJJ.

6 This is before the Court on defendant's motion, Docket 247.

7 THE COURT: Counsel, please enter your appearances
8 for the record. And for the completeness of the record, would
9 you just indicate the party or parties you represent, and any
10 law firm that you're associated with, starting with
11 plaintiffs' counsel, please.

12 MR. GIBSON: Good morning, Your Honor. Steve
13 Gibson, Gibson Lowry Burris, on behalf of all the plaintiffs.

14 THE COURT: Thank you.

15 MR. BOWERS: Good morning, Your Honor. Chad --

16 THE COURT: Let's -- let's get all the plaintiffs
17 first --

18 MR. BOWERS: Oh, I'm sorry. I apologize, Judge.

19 THE COURT: -- if we could. That's okay.

20 MR. BURRIS: Good morning, Your Honor. Jay Scott
21 Burris on behalf of plaintiffs with Gibson Lowry Burris as
22 well.

23 MR. SPILOTRO: Good morning, Your Honor. John
24 Spilotro, Spilotro & Kulla. I am Dr. Kabins' personal
25 attorney.

1 THE COURT: Thank you.

2 Mr. Spilotro, while we're making the record here,
3 were you present during the taking of the deposition that's
4 the target of this motion?

5 MR. SPILOTRO: I was present.

6 THE COURT: Okay. Very good. Did you have a
7 speaking role or were you just --

8 MR. SPILOTRO: I think there may have been one
9 objection that I had made, but that was about it.

10 THE COURT: Okay. Very good.

11 And Mr. Bowers.

12 MR. BOWERS: Sorry. I'll try again, Your Honor.
13 Mr. Bowers, I'm here with Mr. Massi's office on behalf of
14 defendants Benessere, LLC; Cipriani, LLC; Gila Bend 384;
15 Buckeye 80 West Three, LLC; Buckeye Canamex One, LLC.

16 THE COURT: Thank you.

17 MS. IRSFELD: Good morning, Your Honor. Hannah
18 Irsfeld with Irsfeld & Associates. I'm here on behalf of
19 defendants Edward Gutzman III; GEIII, LLC; Benessere
20 Management, LLC; and Cipriani Management, LLC.

21 Thank you.

22 THE COURT: Thank you.

23 MR. SKAGGS: Morning, Your Honor. William Kerry
24 Skaggs, Law Office of William Kerry Skaggs, representing
25 defendants Gabriel Martinez; 99th & Indian School, LLC; 99th &

1 Indian School Management, LLC; Capri I, LLC; Capri II, LLC;
2 and Phoenix 83rd, LLC.

3 THE COURT: Thank you.

4 This is on, as indicated by the clerk, in regard to
5 the motion here filed by the defendant to compel. And I guess
6 the easiest way is to just jump right into the questions that
7 caused a problem. There's some objections here. And the
8 witness, which was Mr. Kabins, was instructed not to answer
9 during the course of the taking of his deposition.

10 Let me ask, in the course of consultation has there
11 been any resolution as to any of these questions or are they
12 all still at issue?

13 MR. GIBSON: I can speak at some level of that, Your
14 Honor.

15 THE COURT: Okay.

16 MR. GIBSON: We did have, I think, substantive meet
17 and confers. And I think that during the course of that
18 substantive meet and confer Mr. Bowers and I, I think,
19 reached some analytical understanding on some things. I
20 would only comment one thing, Your Honor, is that I have
21 instructed most, if not all, I think except for one question
22 was an instruction not for the -- the witness not to answer
23 the question to the extent that it involved the
24 attorney/client communication. And --

25 THE COURT: So how does that -- how does that

1 operate in the taking of a deposition then? Does the -- does
2 your client then have to decide whether it reaches
3 attorney/client privilege, or do you consult, as the rule
4 would require and then answers are given?

5 MR. GIBSON: That -- I think that's exactly right,
6 Your Honor. The --

7 THE COURT: That was an alterative.

8 MR. GIBSON: The -- well no --

9 THE COURT: Which one did you follow?

10 MR. GIBSON: Well, no -- and it was effectively the
11 combination, Your Honor --

12 THE COURT: Yes.

13 MR. GIBSON: -- despite defendants' counsels' rather
14 inappropriate laughter a moment ago. I think that the --

15 THE COURT: That's okay, I joined in.

16 MR. GIBSON: Your Honor's laughter is something I'm
17 never going to comment on.

18 THE COURT: That's okay.

19 MR. GIBSON: The process is, of course, Your Honor,
20 that if I sense that there is an area of inquiry that involves
21 an attorney/client communication, but perhaps does not involve
22 an attorney/client communication, then I need to tell the
23 witness don't answer that question to the extent that it
24 reveals an attorney/client communication. And of course,
25 during the course of the deposition he did want to consult

1 with me and we did consult to the extent that it involved an
2 attorney/client communication.

3 So I think that the answer, while your -- your
4 question was in the alternative, I think that it operated in
5 both regards.

6 THE COURT: Okay. I just wanted to make sure that
7 there was an attempt here by you to say whoa, Judge, I didn't
8 make these decisions, the client did, because if he did I
9 really need him present because I want to parse this out so
10 that we can get some results.

11 MR. GIBSON: And we're -- we would be delighted to
12 have the witness appear before Your Honor to further parse it
13 out, but the answer to the question is that ultimately Dr.
14 Kabins, to the extent that he could, on the witness stand
15 after consulting with counsel appropriately and -- had to
16 make some decision as to whether or not he could reveal the
17 information.

18 Now the other thing, Your Honor, is that we tried
19 to hold down consultation between witness and counsel as
20 much as possible. And to the extent that the witness felt
21 that he could or could not answer the question, then I didn't
22 want to be accused of coaching the witness either and
23 obstructing the deposition. And so Dr. Kabins understood
24 that many, if not all of these questions effectively sought
25 legal conclusions as well. And I think that when I have a

1 further opportunity to speak after Mr. Bowers maybe perhaps
2 makes his argument, I'm prepared to go through each and every
3 one of these questions and demonstrate why the questions could
4 have been phrased in a very different way.

5 THE COURT: Okay. We'll talk about that. We'll
6 talk about that.

7 My question was really to the substance of
8 consultation before the filing of the motion and where that
9 might have rounded some edges and cut some things out.

10 Are we getting okay, Jerry, on the record?

11 THE CLERK: Yes, Your Honor, we are.

12 THE COURT: Thank you.

13 Mr. Bowers, did you want to speak in regard to that
14 question, the consultation impact on this?

15 MR. BOWERS: I'd like to directly answer your
16 question first, which is these questions remain outstanding.

17 THE COURT: Okay.

18 MR. BOWERS: And if I may just briefly comment on a
19 point counsel raised.

20 Our -- my contention is not that counsel was
21 coaching the witness. However, it appeared, through the
22 course of this deposition, that when the instruction was
23 given, to the extent that it violates the privilege, that was
24 a -- that was the instruction taken by Mr. Kabins to mean --
25 I'm, again, not of counsel urging, but as a result the

1 process was -- Dr. Kabins' response was I'm not answering
2 that. And I think as we go through these you'll see some of
3 those where, you know, that -- he just simply, when he hears
4 that, and says I'm not answering that question.

5 THE COURT: Okay.

6 MR. BOWERS: Thank you, Your Honor.

7 MR. GIBSON: May I respond to that point, Your
8 Honor?

9 THE COURT: I don't think you need to.

10 MR. GIBSON: Okay.

11 THE COURT: Let's just deal with some of the
12 individual questions here and the -- whether or not they need
13 to be answered. I think that will get us to the result
14 faster.

15 Is it easier to work out of the materials in the
16 motion or the response?

17 MR. GIBSON: May I speak to that, Your Honor?

18 THE COURT: Sure.

19 MR. GIBSON: On page --

20 THE COURT: Whatever's going to be easiest.

21 MR. GIBSON: On page 16 of actually defendants'
22 initial motion, they list 26 areas of questions up through
23 page 18.

24 THE COURT: I don't want areas of questions, I want
25 specific questions.

2:09-CV-1125-RCJ-RJJ Kabins v. Chain 4/16/10 Motions

1 MR. GIBSON: Yeah, and that -- and so that -- that's
2 part of the problem. For example --

3 THE COURT: Okay. Where's the easiest place to find
4 the specific questions that were asked?

5 MR. GIBSON: And I think that's -- that's a very
6 good question, Your Honor, because what you have before you is
7 not clear as to what specific questions need to be answered,
8 given the presentation of defendants' motion.

9 THE COURT: Okay. What about your opposition? Does
10 it capture the language?

11 MR. GIBSON: We -- my opposition does, in fact,
12 Your Honor, detail all the questions that appear to be at
13 issue, but I don't want to prejudice the defendant. This is
14 defendants' motion. I think it's incumbent upon defendants
15 to point out the specific questions that they want answered,
16 Your Honor.

17 THE COURT: Okay. That's fine.

18 Mr. Bowers, you want to lead out?

19 MR. BOWERS: Whichever you prefer, Your Honor. We
20 can work from page 16 of the motion or page 7 of the response,
21 however Your Court would like to handle it.

22 THE COURT: Okay. On page 16 of the motion, which
23 is Document 247 at line 10, I see that number 1 is, quote:

24 "Do you conduct regular meetings of the
25 partnership?"

1 And then referencing page 19 of the transcript, I
2 assume. Right?

3 MR. BOWERS: Yes, Your Honor.

4 THE COURT: Okay. And then I see on page 7 of the
5 opposition, number 258 at line 1, disputed question, quote:

6 "Do you conduct regular meetings of the
7 partnership?" End quote.

8 Sounds like they're the same.

9 MR. BOWERS: Appears so to me, Your Honor.

10 THE COURT: Okay.

11 MR. GIBSON: On that question -- on that -- most of
12 the questions on 16 through 18 are, in fact, questions
13 phrased. There are a few of them, however, that are not.

14 THE COURT: Okay.

15 MR. GIBSON: But I --

16 THE COURT: And all of these were questions where
17 there was a refusal to answer?

18 MR. GIBSON: No, Your Honor, there's -- I don't
19 believe there was ever a refusal to answer.

20 THE COURT: Okay.

21 MR. GIBSON: I believe that the answer was that it
22 implicated attorney/client privilege and that was the -- it's
23 not as if the witness stood there silently saying I refuse to
24 answer the question.

25 THE COURT: What I meant, there was no assertion of

1 a privilege. There was an answer given, answers were not
2 given. In fact, the response was assertion of a privilege.

3 MR. GIBSON: The response -- the response was that
4 the only way I could answer the question would be to reveal
5 an attorney/client communication, and that I believe is a --
6 is an appropriate answer, Your Honor. In other words, the
7 answer was other than attorney/client privilege
8 communications, I cannot further answer the question, which
9 is in fact, responsive to the question because it's basically
10 saying I can't -- I don't have any information for you other
11 than my understanding of the dynamic between my attorney and
12 me. And so I think that's very different, Your Honor,
13 because that -- that is a substantive articulation of what
14 facts there are.

15 There are no facts that I can relate to you, Mr.
16 Massi, other than what would be implicated by the
17 attorney/client privilege. I believe that that's more of an
18 answer than merely saying, well, I'm only claiming
19 privilege.

20 THE COURT: Okay. Let's try this out a little bit
21 here. Let's take the first question.

22 "Do you conduct regular meetings of the
23 partnership."

24 So I'm now looking at the attachment to the motion,
25 which includes the portions of the transcript. Okay.

1 So I look at that, and we're at line 20 of page 19
2 and I see:

3 "Question: Do you conduct regular meetings of the
4 partnership?

5 "Answer: Move -- Move on.

6 "Mr. Gibson: I renew all my objections I made.

7 "By Mr. Massey. Go ahead.

8 "Answer: I would move on.

9 "Question: Why?

10 "Because as stated, attorney/client privilege."

11 MR. GIBSON: And, Your Honor, what you don't have
12 is pages 17 through 18, which were the prior comparable
13 questions that dealt with the existence of the partnership
14 and the discussion of the fact that, that whether -- which
15 partnership they're talking about, whether or not --

16 THE COURT: Okay. Let's stop there because I want
17 to take these one by one. Okay. So when the question is
18 asked on line 20 of page 19 of the transcript and it says do
19 you conduct regular meetings of the partnership? Mr. Kabins
20 did not understand which partnership it was. Is that right?
21 Is that what you're saying?

22 MR. GIBSON: Well, no, I didn't say that. I --

23 THE COURT: Well, you said we don't know which
24 partnership it is.

25 MR. GIBSON: Well, that and --

2:09-CV-1125-RCJ-RJJ Kabins v. Chain 4/16/10 **Motions**

1 THE COURT: Do I need to play that back for you?

2 MR. GIBSON: No. And that --

3 THE COURT: Okay. Then let's --

4 MR. GIBSON: No, but that's involved, but that's not
5 the extent of it, Your Honor. And that involved --

6 THE COURT: I want to take these one at a time.
7 That was your first assertion. He didn't know which
8 partnership this was.

9 MR. GIBSON: Well, I want to say that that's what I
10 believe at the time may very well have been going through Dr.
11 Kabins' mind.

12 THE COURT: I don't want supposition. You filed a
13 response.

14 MR. GIBSON: And that's --

15 THE COURT: I don't see an affidavit from Dr. Kabins
16 saying what the problem is with this one. Okay.

17 MR. GIBSON: And Your Honor --

18 THE COURT: So I'm going to go on the record --

19 MR. GIBSON: And that's fine, Your Honor.

20 THE COURT: -- and you've raised a question that he
21 didn't know which partnership it was.

22 MR. GIBSON: Well, my --

23 THE COURT: And I'm saying where is that solidified
24 in your opposition or in the record that's before the Court?

25 MR. GIBSON: And part of my point, Your Honor, is

1 that what -- why this question involves an attorney/client --
2 I should have phrased that more carefully, and I apologize,
3 Your Honor.

4 THE COURT: That's okay. I'm going to take this
5 piece by piece --

6 MR. GIBSON: And I -- and I appreciate that.

7 THE COURT: -- and we'll just parcel it, split it
8 up --

9 MR. GIBSON: And my -- my --

10 THE COURT: -- slice and dice it and then we'll get
11 answers.

12 MR. GIBSON: -- and the argument that we were
13 making --

14 THE COURT: So is there any question as to what
15 partnership is being referred to in the question at line 20 on
16 page 19 of the deposition transcript?

17 MR. GIBSON: I think the answer to that question,
18 Your Honor, is certainly yes, but our argument, Your Honor,
19 is that this implicates an attorney/client privilege at
20 several levels.

21 THE COURT: I'm not at that yet.

22 MR. GIBSON: Okay.

23 THE COURT: I only want to establish, is there a
24 question as to which partnership this question is talking
25 about.

2:09-CV-1125-RCJ-RJJ Kabins v. Chain 4/16/10 Motions

1 MR. GIBSON: In terms of that particular question,
2 the answer is yes --

3 THE COURT: Okay.

4 MR. GIBSON: -- there would be a question.

5 THE COURT: There's an ambiguity?

6 MR. GIBSON: If we move on to number 2 --

7 THE COURT: No, let's --

8 MR. GIBSON: Right.

9 THE COURT: -- just stay with the first one here.

10 MR. GIBSON: Right.

11 THE COURT: You say there's a question as to which
12 partnership is involved. Okay.

13 MR. GIBSON: That's right.

14 THE COURT: Okay. Did you talk --

15 MR. GIBSON: At a minimum.

16 THE COURT: -- did you talk with counsel about that
17 issue, either at the deposition or in the personal
18 consultation regarding the motion?

19 MR. GIBSON: We did.

20 THE COURT: And where is that memorialized?

21 MR. GIBSON: I -- we did not memorialize the meet
22 and confer, Your Honor.

23 THE COURT: Tell me what the discussion in the meet
24 and confer was in regard to the ambiguity in the question at
25 line 20 of page 19 of the transcript?

1 MR. GIBSON: Sure.

2 THE COURT: What was the discussion?

3 MR. GIBSON: The discussion centered on whether or
4 not this involved the potentiality reasonably of an
5 attorney/client privilege.

6 THE COURT: No, no, no, no, no. You've asserted
7 that there's a question as to an ambiguity regarding which
8 partnership this question is about.

9 MR. GIBSON: And -- and --

10 THE COURT: Can I finish?

11 MR. GIBSON: Sure.

12 THE COURT: Then I'll give you a chance without
13 interruption. I promise.

14 MR. GIBSON: I understand, Your Honor.

15 THE COURT: Okay. I just want to deal with that
16 single issue. I want to know what the discussion was about
17 the uncertainty, the confusion or the ambiguity as to what
18 partnership meant.

19 MR. GIBSON: That was not the focus --

20 THE COURT: It was not discussed in the personal
21 consultation?

22 MR. GIBSON: That -- that -- Your Honor, if I may?

23 THE COURT: Well, --

24 MR. GIBSON: That --

25 THE COURT: -- you're saying not.

1 MR. GIBSON: No.

2 THE COURT: Not sounds like no.

3 MR. GIBSON: But, no --

4 THE COURT: That's a quick answer. I don't want to
5 stray into another field of discussion.

6 MR. GIBSON: Your Honor, if you'll --

7 THE COURT: Was it discussed in the personal
8 consultation that there's an ambiguity or a misunderstanding
9 as to what the partnership meant?

10 MR. GIBSON: Within the context of the
11 attorney/client privilege. Yes.

12 THE COURT: No, not within anything. In the
13 personal consultation was that raised as an issue?

14 MR. GIBSON: Independent of the attorney/client
15 privilege, no.

16 THE COURT: Just yes or no. Was it discussed that
17 there's an --

18 MR. GIBSON: It was --

19 THE COURT: -- ambiguity or question --

20 MR. GIBSON: -- it was discussed.

21 THE COURT: -- as to which partnership?

22 MR. GIBSON: It was discussed.

23 THE COURT: Okay. Tell me what the discussion was.

24 MR. GIBSON: As I was trying to do, Your Honor, it
25 was discussed within the context of the attorney/client

1 privilege.

2 THE COURT: How? I want to get to this issue.

3 You see you raised multiple issues. You've just raised
4 there's a question or ambiguity as to what partnership this
5 is. There's a second issue as to whether attorney/client
6 privilege applies.

7 MR. GIBSON: I think that there --

8 THE COURT: There may be --

9 MR. GIBSON: Sorry, Your Honor.

10 THE COURT: Is this hard to do?

11 MR. GIBSON: Sorry, Your Honor.

12 THE COURT: Okay. It may be that there are other
13 issues. And so what you do is you take these things one
14 layer at a time, at least that's the -- that's the simple way
15 my mind does it. Okay? And so that's where I'm at. I don't
16 want to talk about attorney/client privilege, I don't want to
17 talk about any of those other levels. I want to talk about
18 the question as to what partnership in the simple language
19 that we've often heard, what does partnership mean here? And
20 my question is, was that part of the discussion --

21 MR. GIBSON: That --

22 THE COURT: -- as to what --

23 MR. GIBSON: Sorry. I thought you were done, Your
24 Honor.

25 THE COURT: Well, I'm going to now pose the

1 question. Was it discussed as to what partnership meant in
2 the question asked at line 20 of page 19 of the deposition
3 transcript?

4 MR. GIBSON: Yes.

5 THE COURT: Okay. What was the discussion about
6 that confusion, ambiguity, and maybe you could tell me what
7 it is? Is it an ambiguity, is it a confusion, what -- what
8 was it?

9 MR. GIBSON: It is --

10 THE COURT: And you started to say -- excuse me
11 for interrupting, but I just want to kind of clarify that
12 I'm following you, that your client may have been or may
13 have had a subjective problem with this. That's not in the
14 opposition.

15 MR. GIBSON: I understand, Your Honor.

16 THE COURT: I can tell you. I've read the
17 opposition, it's not there.

18 MR. GIBSON: I understand.

19 THE COURT: So I don't want supposition. There's no
20 affidavit from your client. What is the problem in regard to
21 the partnership?

22 MR. GIBSON: The problem with regard to the
23 partnership is that it invites an attorney/client privilege
24 communication. That's the problem with the partnership.

25 THE COURT: That's -- okay, that's not the issue I'm

1 asking about, not the issue you've raised. So there's no
2 question as to what partnership we mean in that question?

3 MR. GIBSON: I think there is, but that's a --
4 that's not an issue that -- that's not an -- this discussion
5 is merely not about ambiguous questions.

6 THE COURT: That's --

7 MR. GIBSON: And I --

8 THE COURT: That's the first level of it, though.

9 MR. GIBSON: But we're not -- the object -- the
10 objection that I interposed and the instruction that I
11 interposed, Your Honor, was not, based -- I think I have --

12 THE COURT: Okay.

13 MR. GIBSON: -- no standing --

14 THE COURT: Okay. I think I'm getting it. I think
15 I'm getting it. You see an issue of ambiguity but it really
16 wasn't raised at the time of the deposition and it's not
17 before the Court today.

18 MR. GIBSON: That is my -- that's exactly my point.

19 THE COURT: Great. We're past that point then.
20 We're past that point.

21 MR. GIBSON: Now, Your Honor, to the extent --

22 THE COURT: So the only objection left then is
23 attorney/client privilege.

24 MR. GIBSON: Yes, Your Honor.

25 THE COURT: Okay. Tell me -- tell me why the

1 question, do you conduct regular meetings of the partnership
2 invokes attorney/client privilege?

3 MR. GIBSON: Thank you, Your Honor.

4 This question was designed -- it was -- it was not
5 a question on do you ever meet with your partners. This is
6 a statutorily based type of question. Is there -- is there --
7 are there --

8 THE COURT: Based on what? I'm not --

9 MR. GIBSON: Well, the question -- the question is
10 what does he mean by -- and I -- we have to look at the
11 meaning of the question. If you're in a corporate context or
12 in an entity context such as a limited partnership, the
13 question is one of law in terms of is this a regularly
14 required meeting that you have established. And is that -- in
15 other words, if Dr. Kabins answered yes --

16 THE COURT: I'm sorry, you just inserted required in
17 there, but the question doesn't talk about required.

18 MR. GIBSON: And I understand that, but that -- in
19 the con -- I believe that in the -- that is a very reasonable
20 in the context -- the thrust of this question --

21 THE COURT: You want to rewrite the question, is
22 that what you're telling me?

23 MR. GIBSON: I think that -- I think that --

24 THE COURT: Is that what you're telling Mr. Bowers
25 and his client?

1 MR. GIBSON: I think that this question -- I think
2 this question 1 and 2 are probably Mr. Bowers --

3 THE COURT: Just deal with one. Just deal with one.

4 MR. GIBSON: And I think that, Your Honor, to the
5 extent that 1 -- 1 may be the best question that he -- that he
6 asked in terms of being the least offensive question in terms
7 of the attorney/client privilege. What I'm trying to explain,
8 Your Honor, is -- and if we look at the other questions it
9 will become even more readily apparent. But on number 1, I
10 looked at the question in terms of a corporate limited
11 partnership background.

12 THE COURT: Whoa, we're not dealing with the
13 corporation.

14 MR. GIBSON: I --

15 THE COURT: In fact it says partnership.

16 MR. GIBSON: And that -- he was referring, as he did
17 in the second question, when he said the partnership --

18 THE COURT: Just question 1.

19 MR. GIBSON: I know.

20 THE COURT: Just question 1, Mr. Gibson. Don't
21 stray into number 2.

22 MR. GIBSON: Well, Mr. Massi could have only been
23 asking about the limited partnership because that was the only
24 thing on the table in the context of the deposition, Your
25 Honor. So in the context of the deposition it is this formal

1 entity, this limited partnership that was being inquired
2 about.

3 THE COURT: Okay.

4 MR. GIBSON: And so he is basically asking Dr.
5 Kabins -- if Dr. Kabins says yes, we have regular meetings,
6 he could be perjuring himself or being inaccurate as a matter
7 of law.

8 THE COURT: Well, was perjury raised as an objection
9 here? I didn't see that anywhere.

10 MR. GIBSON: No. I'm saying if he answered the
11 question in that way. I'm speaking hypothetically.

12 THE COURT: Well, then that's not raised so that's
13 not on the table. Let's just talk about what's on the table.

14 MR. GIBSON: What's on the table is, is the position
15 that Mr. Massi put Dr. Kabins in with respect to this
16 question. The position that Mr. Massi put Dr. Kabins in with
17 respect to this question was, can I answer this question yes
18 or can I answer this question no? And I saw my client being
19 put in that position.

20 And if he answers the question yes, I saw the
21 shortcut to this is, this involves, potentially, an
22 attorney/client communication as to whether or not Dr. Kabins,
23 with his corporate counsel, talked about whether or not there
24 was actually regularly scheduled meetings pursuant to the
25 limited partnership requirements, any statutory requirements

1 that are there.

2 Now I'm not saying that Dr. Kabins could not have
3 answered this question. He could have answered this question
4 but to the extent that, for example, his corporate counsel,
5 that I have not been, said these are, in fact, regularly
6 scheduled meetings as required by the limited partnership.
7 Or these are non-required meetings. Or the meeting -- the
8 informal meetings that you've had are not the kind of regular
9 meetings what -- that might be required by the limited
10 partnership.

11 The question -- if the question was, did you ever
12 meet with any of your partners, that would not have imbued, in
13 my view, any attorney/client communication in terms of what
14 connotes a regular meeting within the prescriptions of the
15 limited partnership. I think that's a very different context
16 and I think that Dr. Kabins should have -- can and should have
17 answered that question without any instruction about an
18 attorney/client privilege.

19 THE COURT: Amazing. Did that end up on the record,
20 my comment, amazing, 'cause that's my comment to that whole
21 discussion. Why don't you be seated.

22 Mr. Bowers, anything on question 1?

23 MR. BOWERS: I would only answer that I think Dr.
24 Kabins could have answered that yes, no, or I don't know,
25 without involving any attorney communication whatsoever. And

1 I would say even had Dr. Kabins been directed by a lawyer to
2 hold regular meetings or not hold regular meetings, a yes, no,
3 or I don't know answer would not, in any way, invade that
4 privilege.

5 THE COURT: Anything in response, Mr. Gibson?

6 MR. GIBSON: No, Your Honor.

7 THE COURT: Thank you.

8 Let me just ask this if I could, Mr. Gibson, 'cause
9 that'll -- that will help us all as we go forward. Give me
10 your definition of attorney/client privilege and then the
11 elements that must be shown to demonstrate attorney/client
12 privilege applies to information.

13 MR. GIBSON: Yes, Your Honor. And this is actually
14 consistent I think also with the Ruehl [phonetic] case.
15 There's got -- there has to be, one, an attorney/client
16 relationship present, and at a minimum, two, the communication
17 has to be within the scope of that attorney/client
18 communication or a confidential communication that's
19 associated with that relationship between the attorney and the
20 client.

21 THE COURT: That's all? Is that all?

22 MR. GIBSON: I believe that that encapsulizes what
23 is required for these purposes, Your Honor.

24 THE COURT: Okay. All right. In the Ninth Circuit
25 there's actually more elements to it than that, and there's

1 some good case law that's outlined that.

2 Let me do this 'cause we'll just deal with these one
3 at a time. Normally I would just accumulate things and then
4 we'd just deal with them all at the end.

5 In regard to the argument here that the question
6 number 1, "Do you conduct regular meetings of the
7 partnership," somehow invokes attorney/client privilege is
8 absolutely bogus in the opinion of this Court, and is a
9 frivolous objection. It does not comply with any portion of
10 Rule 30 and was not appropriately made on the record.

11 Let's go to question number 2. Number 2 in the
12 motion at page 16 says:

13 "Are there regular meetings set for the conduct of
14 the business of the partnership known as the Kabins
15 Family Limited Partnership?"

16 On page 7 of the opposition, the question is
17 captured as quote:

18 "Are there regular meetings set for the conduct of
19 the business of the partnership known as the Kabins
20 Family Limited Partnership?" End quote.

21 Mr. Gibson, what was the response to this particular
22 question?

23 MR. GIBSON: Again, Your Honor, to the extent that
24 it involved an attorney/client communication, the witness
25 should not answer the question. And if this was not an

1 instruction wholesale not to answer the question.

2 THE COURT: Okay. Let's go back and capture what
3 the response actually was. So let's see --

4 MR. GIBSON: Oh, the response -- the response -- I'm
5 sorry, I didn't -- I wanted -- I didn't know if you meant my
6 objection in part in response, Your Honor.

7 THE COURT: Okay. Let's go find the question then.

8 MR. GIBSON: The response was I would say move on
9 again. It requires attorney/client privilege.

10 THE COURT: The question starts at line 24 on page
11 20 of the transcript of the deposition and goes to page 21.
12 On line 2 of page 21 Mr. Gibson, quote:

13 "Objection. Ambiguous."

14 What is ambiguous about the question?

15 MR. GIBSON: Well, it's -- one is -- actually
16 you're right, Your Honor. The first is, this whole -- whole
17 notion of what is a regular meeting and how they're set. I
18 believed, when I made that objection, that I was -- I believe
19 that he was asking whether or not these are required regular
20 meetings mandatorily set by some, either contract or legal
21 principle, either statute or by the operating provisions of
22 the agreement.

23 THE COURT: Okay. Let me ask you a question. Under
24 Rule 30 is ambiguity an appropriate objection to a question?
25 What does Rule 30 say?

1 MR. GIBSON: I understand your concern with the
2 speaking objection here, Your Honor.

3 THE COURT: My question was, what does Rule 30 say?
4 Does it give ambiguity as an appropriate objection to a
5 question in the taking of a deposition?

6 MR. GIBSON: I think that the actual prescription --

7 THE COURT: Point me to the --

8 MR. GIBSON: -- or the answer's --

9 THE COURT: -- section of the rule.

10 MR. GIBSON: The answer's no, Your Honor. Rule 30
11 per se does not provide ambiguity. By the language of Rule 30
12 does not provide ambiguity as an appropriate objection. I
13 believe that --

14 THE COURT: So where do you get the authority to
15 interrupt the taking of a deposition by asserting ambiguous?

16 MR. GIBSON: I believe that my reading of cases
17 such as the In Re: Strassford [phonetic] case, which I don't
18 have before Your Honor because it's not been -- there's been
19 no claim in defendants' motion as to the impropriety of any
20 of the objections, per se, so we did not brief that issue
21 out.

22 THE COURT: You're not dealing with -- you're not
23 dealing now with the -- only what's been raised by the defense
24 here. You're facing the Court --

25 MR. GIBSON: I understand.

1 THE COURT: -- and the Court is searching a
2 transcript, and I am looking at the language that you put on
3 the record in that taking of the transcript.

4 MR. GIBSON: I understand, Your Honor.

5 THE COURT: And I'm now asking you, where's your
6 authority to assert that objection during the taking of a
7 deposition.

8 MR. GIBSON: I believe that the case law in
9 interpreting Rule 30 may very well provide me --

10 THE COURT: You show it --

11 MR. GIBSON: I did not bring that case law with me,
12 Your Honor.

13 THE COURT: That's fine. We'll take a break and you
14 get it.

15 MR. GIBSON: Okay.

16 THE COURT: I -- we're going to parse this out today
17 and get to the end of this. Okay.

18 MR. GIBSON: Okay.

19 THE COURT: We'll just take a brief recess. You
20 got a BlackBerry or something so you can call that up or a
21 laptop?

22 MR. GIBSON: I don't -- I did not -- I'd have to go
23 back to my office and research the case.

24 THE COURT: You make a call and get some help then.
25 We're going to get this thing done today. This -- what I've

1 seen so far is absolutely frivolous. Now I don't know what
2 you project as to where you want to end up at the end of this
3 whole exercise, but I can tell you this, you're not helping
4 your client or yourself in what you're doing here --

5 MR. GIBSON: I --

6 THE COURT: -- at least what you've done so far.
7 This is an absolute waste of time for all of these attorneys
8 and for the Court and for you and your client.

9 MR. GIBSON: I understand what you're saying, Your
10 Honor.

11 THE COURT: What you've just told me is, there's no
12 authority in Rule 30 to assert an objection and interrupt the
13 taking of a deposition by a claim of ambiguous.

14 MR. GIBSON: I believe that the case law that
15 interprets Rule 30 permits appropriate objections to
16 questions, if they're in the vein of harassing, if they're --
17 that --

18 THE COURT: The objection's ambiguous.

19 MR. GIBSON: I understand, Your Honor. And this is
20 in the context of --

21 THE COURT: Ambiguity --

22 MR. GIBSON: I'm sorry.

23 THE COURT: -- ambiguity is covered in those cases,
24 'cause I don't see those cases in your brief.

25 MR. GIBSON: I -- that -- because the -- that was

1 not at issue, Your Honor, by defendant's motion. Defendant's
2 motion was centered on whether or not Dr. Kabins needed to
3 answer these questions. Dr. Kabins -- I did not -- I did not
4 instruct -- I did not instruct Dr. Kabins to answer this
5 question. I was -- I thought that I did, but on this one I
6 actually did not indicate any instruction to Dr. Kabins not
7 to answer the question on the basis of attorney/client
8 privilege. I indicated it calls for a legal conclusion, and
9 in that vein he indicated, on his own, that his answer would
10 have involved an attorney/client privilege. And so I would --
11 I would agree, Your Honor, to the extent that the witness'
12 answer to this question was this -- this --

13 THE COURT: Let's do this. I'm going to save you
14 some time and some trouble and maybe some embarrassment today.
15 All right?

16 MR. GIBSON: Yes, Your Honor.

17 THE COURT: If that's possible.

18 It's the order of the Court at this time that the
19 motion, number 247, is granted in its entirety. Mr. Kabins
20 is to sit for the taking of his deposition and these questions
21 will be answered, as well as any of those that reasonably flow
22 from them. There is no time limit on the conclusion of this
23 deposition.

24 I believe there was a request for the appointment of
25 a special master to supervise the taking of the deposition.

1 Is that correct?

2 MR. BOWERS: Yes, Your Honor, that is correct.

3 THE COURT: Mr. Gibson, did you want to say anything
4 about that request?

5 MR. GIBSON: No, Your Honor.

6 THE COURT: That request is denied. The Magistrate
7 Judge will supervise the taking of the deposition.

8 The deposition will be set to take place here in the
9 Lloyd D. George United States Courthouse. We can make this
10 courtroom or another room next door available for it. It will
11 occur during normal business hours of the court, during normal
12 judicial days of the court.

13 How soon can arrangements be made to take the
14 deposition?

15 MR. GIBSON: We will commence immediately to talk to
16 Dr. Kabins and provide counsel with dates as soon as possible,
17 Your Honor.

18 THE COURT: What's the discovery situation in the
19 case right now? Let me get that on the record first. Where
20 do things stand in regard to discovery in the case?

21 MR. GIBSON: We've gone through the initial case
22 conference, Your Honor.

23 THE COURT: What's -- okay.

24 MR. GIBSON: And written discovery is about to be
25 sent.

2:09-CV-1125-RCJ-RJJ Kabins v. Chain 4/16/10 **Motions**

NW TRANSCRIPTS, LLC - Nevada Division
P.O. Box 890
Nampa, Idaho 83653-0890
(208) 466-4148 - gayle@nwranscripts.com

1 THE COURT: Okay. All right.

2 Mr. Spilotro --

3 MR. SPILOTRO: Yes. Yes, Your Honor.

4 THE COURT: -- you had something here? You're not
5 counsel of record in this case.

6 MR. SPILOTRO: No, but I am his personal attorney,
7 Your Honor.

8 THE COURT: That's nice.

9 MR. SPILOTRO: No, I understand.

10 THE COURT: But --

11 MR. SPILOTRO: And obviously I was his -- also
12 counsel on the criminal matter with Dr. Kabins that was in
13 front of --

14 THE COURT: I understand. That's closed now as I
15 understand it.

16 MR. SPILOTRO: No, and I -- Yes. What I wanted --

17 THE COURT: Yes or no?

18 MR. SPILOTRO: Yes, it is.

19 THE COURT: Okay. He's been sentenced?

20 MR. SPILOTRO: Yes, sentencing has occurred.

21 THE COURT: Okay.

22 MR. SPILOTRO: What I wanted to advise the Court,
23 you know, scheduling this deposition, my purpose in being
24 there --

25 THE COURT: Yes.

1 MR. SPILOTRO: -- was in regards to the criminal
2 case. And I received the accommodation of Mr. Massi and
3 everyone involved. My concern was is whether any questions
4 would go into that criminal investigation because regardless,
5 I believe this deposition, I don't know if it was taken
6 before sentencing or after, but there's still separate
7 sovereignty issues, Fifth Amendment concerns, et cetera.

8 So they said we're not -- we won't go into that.
9 We've been litigating this over in state court and other
10 civil cases that involve Dr. Kabins. And --

11 THE COURT: All right. I have several others with
12 his involvement either as a witness or a party.

13 MR. SPILOTRO: Yes. And I think I have some may be
14 before Your Honor that have been filed.

15 THE COURT: Mm-hmm.

16 MR. SPILOTRO: And the rulings there have been, you
17 know, you get asked about the conviction, the date of
18 conviction and what the conviction was.

19 So with this deposition that you're scheduling, that
20 was my only purpose of being at this deposition, Your Honor,
21 so you know. And so my concern is, is whether that
22 accommodation will still be made that when we reconvene this
23 deposition that that would be the case, or if I have to worry
24 about them getting questions regarding that --

25 THE COURT: What would -- that what would be the

2:09-CV-1125-RCJ-RJJ Kabins v. Chain 4/16/10 Motions

1 case?

2 MR. SPILOTRO: The criminal investigation.

3 THE COURT: It's not a factor. The case is closed.

4 Right?

5 MR. SPILOTRO: Well --

6 THE COURT: Jeopardy has attached.

7 MR. SPILOTRO: As far as federal, Your Honor.

8 There's still state jeopardy that may attach.

9 THE COURT: Is the state considering the
10 presentation of a charge?

11 MR. SPILOTRO: My reading is the case -- case law,
12 and as I have briefed, it's -- it's as long as it may
13 incriminate him, even if there is no threat of prosecution
14 you may validly assert a Fifth Amendment privilege. So --

15 THE COURT: Okay. As to the questions that are at
16 issue in this particular motion, do any of them trigger
17 potential --

18 MR. SPILOTRO: No. No, these questions do not.

19 THE COURT: Okay.

20 MR. SPILOTRO: So no, but my point is, is if this
21 deposition -- you must also understand this. My understanding
22 was, is I don't know that that deposition really was
23 concluded. They were going to ask more questions. I mean
24 this is going to go on and on. So my question is, is do I
25 have that same accommodation regarding the criminal

1 investigation or whether that should be something either I
2 file for a protective order or that we deal with, you know,
3 prior to sitting down for this deposition. That's my
4 concern, Your Honor. It's for judicial economy as much as
5 anything, otherwise we're gonna sit in a deposition for I
6 don't know how long and I may be asserting Fifth and taking
7 contempts or not taking contempts.

8 THE COURT: Actually you won't assert the Fifth.
9 Your client would assert the Fifth.

10 MR. SPILOTRO: Yeah, the -- or I would instruct him
11 to.

12 THE COURT: And no one will hold you in contempt.

13 MR. SPILOTRO: No, I understand.

14 THE COURT: We'll just move the case forward here.

15 MR. SPILOTRO: I understand. So anyway, that --
16 that was my question is whether that same accommodation is
17 going to occur.

18 THE COURT: So the question is what, will you be
19 able to attend the taking of the deposition and assert, or
20 help him assert any of his rights in regard to the criminal
21 case, or potential criminal case?

22 MR. SPILOTRO: Yes, Your Honor, if need be.
23 However, if they're giving the accommodation that that's --
24 they're not going into those areas, then it's a non-issue.

25 THE COURT: Okay.

1 MR. SPILOTRO: As it was as we sat through this
2 deposition it really was a non-issue --

3 THE COURT: Okay.

4 MR. SPILOTRO: -- based on the agreement of the
5 defense counsel.

6 THE COURT: Mr. Bowers.

7 MR. BOWERS: Can I -- if I first may answer. I
8 believe the Court has a direct question pending to counsel.
9 And Mr. Massi apologized for not being here today, he's in
10 at a board reading for his daughter's university he sits on
11 or something. But he explicitly instructed me that if the
12 order of this Court involved a continuation of the
13 deposition of Dr. Kabins that he would make himself
14 available at the convenience of the hearing masters, or in
15 this instance Your Honor or whatever mechanism Your Honor
16 has in place to provide it. So the answer to the Court's
17 question, we will be here with bells on as soon as the Court
18 would like us here.

19 I appreciate Mr. Spilotro standing up and I do think
20 this is a point that needs some clarification. As I
21 understand it, there was a specific agreement between the
22 parties not to go into Dr. Kabins' criminal issues, if we can
23 call it that in a broad scope at the time of this hearing
24 because Mr. Spilotro I believe anticipated that they would be
25 resolved at the conclusion of the federal case and Albert --

1 Mr. Massi and Mr. Spilotro seemed to have an agreement on
2 that. And I'm not sure if that -- I'm stating that correctly
3 or not, but that was my understanding.

4 MR. SPILOTRO: That is correct, Your Honor.

5 MR. BOWERS: Okay. And then my further
6 understanding as we're sitting here today, Mr. Spilotro is
7 taking the opportunity to advance clarify the record that
8 the end of the federal criminal case may not clear this
9 issue up, and we may have this same issue now again for
10 other potential reasons of jeopardy in state court or other
11 places.

12 MR. SPILOTRO: That's correct.

13 MR. BOWERS: Okay. There has been no agreement
14 between the parties, I guess, now post-federal proceedings. I
15 guess Al and Mr. Spilotro could talk, if they can come to an
16 agreement or if Mr. Spilotro would provide us with
17 limitations. Maybe we need to bring that back before the
18 Court. I don't know if there's an agreement going forward.

19 MR. SPILOTRO: Well, I will speak to Mr. Massi, but
20 there's other defense counsel that need to be --

21 MR. BOWERS: Heard on this issue. Okay.

22 MR. SPILOTRO: Your Honor, I'll have a meet and
23 confer with all defense counsel --

24 THE COURT: Okay.

25 MR. SPILOTRO: -- and see if I can straighten it

1 out.

2 THE COURT: All right.

3 MR. SPILOTRO: And then proceed accordingly.

4 THE COURT: Okay. Very good.

5 In the sanctions that are available under Rule 37,
6 one of those deals with the costs, including attorneys fees
7 for bringing the motion.

8 Mr. Bowers, how soon could you submit an affidavit,
9 along with the necessary detail under Ninth Circuit law of
10 the costs and fees involved in bringing the motion?

11 MR. BOWERS: I believe -- I apologize, Your Honor.

12 THE COURT: That's okay.

13 MR. BOWERS: I believe we could have that to you no
14 later than a week from Monday. If that's too long for the
15 Court we could probably do it quicker, but --

16 THE COURT: Okay. That'd be fine. That would be
17 the 26th of April then.

18 MR. BOWERS: Okay, Your Honor.

19 THE COURT: And Mr. Gibson, could you respond to
20 that within one week?

21 MR. GIBSON: Yes, Your Honor.

22 THE COURT: Okay. That response would be due then
23 on or before May 3, 2010. And then my assistant will be in
24 touch with your offices and set a time that would be available
25 to conduct a hearing because that's required under Rule 37.

1 Also if you'll just contact my chambers in regard to
2 scheduling the deposition.

3 Mr. Bowers, I assume you'll take the lead on that?

4 MR. BOWERS: That would be fine, Your Honor.

5 THE COURT: Okay.

6 MR. BOWERS: Just so there's no unnecessary
7 contention, my intent would be to contact your chambers,
8 find dates that you're available, cross reference them with
9 what I have and then simply inform Mr. Gibson these are the
10 available dates that are mutually available.

11 THE COURT: Yes. That would be fine. And my
12 intent is not to sit in on the taking of the deposition, but
13 I would want to be in the jurisdiction and available --

14 MR. BOWERS: Thank you, Your Honor.

15 THE COURT: -- to answer any questions immediately.
16 That will avoid continued collateral motion practice like
17 this, and enable the parties to get to a result. Okay.

18 Anything further today?

19 MR. GIBSON: One other thing, Your Honor. I
20 believe I raised before Judge Pro the potentiality of a
21 conflict of interest on the part of Mr. Massi's office. And
22 I believe that we're going to be filing very swiftly, after
23 we research and analyze that further, that motion, I just
24 wanted to go on record again to say that this is a continuing
25 concern on the part of the plaintiff and that we will attempt

1 to get that -- that -- to the extent that we -- after we
2 finalize our research and analysis on that, as Mr. Massi is
3 an equity holder, as we under -- is a continuing equity
4 holder in some of the defendants we have, and I've raised
5 this concern with Mr. Massi's office, an ongoing concern
6 with respect to a possible conflict of interest there. And
7 I don't know if that will have any implication whatsoever on
8 the scheduling or taking of the deposition. I would imagine
9 it would not, but I did want to raise again on the record our
10 concerns in that regard.

11 THE COURT: And what is the basis of the
12 disqualification?

13 MR. GIBSON: That there's a conflict of interest,
14 based upon Mr. Massi's status as an equity holder in the
15 entities potentially advancing his own selfish interest to
16 secure his participation in the economic proceeds of the
17 entities, other than the entities themselves is one concern.

18 Another concern is that does Mr. Massi have adequate
19 authority to be acting on behalf of the entities.

20 THE COURT: Well, we always assume authority unless
21 there's -- there's something from the other side. That's not
22 open to attack by counsel on the opposite side. So --

23 MR. GIBSON: He's --

24 THE COURT: So let's just assume there's authority.

25 MR. GIBSON: He's indicated --

1 THE COURT: The question is whether there's a
2 conflict, it sounds like?

3 MR. GIBSON: Well, the con -- part of the conflict
4 analysis will be whether or not -- the defendants have raised
5 the notion at times that Dr. Kabins is a controlling person
6 within these entities, or can effectuate control. If Mr.
7 Massi is representing the entities that Dr. Kabins controls
8 and is engaged in this kind of adversarial process with Dr.
9 Kabins, that raises a specter of a potential conflict of
10 interest. And that's something that we're finalizing our
11 analysis on.

12 THE COURT: Which of these groups is he an equity
13 holder in?

14 MR. GIBSON: I believe -- I believe, based upon the
15 last information that Gila Bend, Cipriani and Benessere are
16 where Mr. Massi holds an equity interest currently, based upon
17 last available information.

18 THE COURT: Give me those three again, please.

19 MR. GIBSON: That would be the Benessere entity,
20 Your Honor.

21 THE COURT: Which one?

22 MR. GIBSON: Benessere.

23 THE COURT: Benessere. Okay. What else?

24 MR. GIBSON: The Cipriani entity. And when I use
25 the word entity, Your Honor, that is the -- not the management

2:09-CV-1125-RCJ-RJJ Kabins v. Chain 4/16/10 **Motions**

1 company but the LLC. All of these are non-management
2 companies.

3 THE COURT: Okay. Cipriani.

4 MR. GIBSON: Yes, Your Honor.

5 THE COURT: And what was the other one?

6 MR. GIBSON: Gila Bend.

7 THE COURT: Out here in the west we call that Gila.

8 Does anyone on the defense side know of these
9 ownership interests or equity interests?

10 MR. BOWERS: I can speak briefly to that. There are
11 a number of partners in all these entities. I believe it is
12 an accurate statement that Mr. Massi has some equity interest
13 in those entities.

14 If I may, Your Honor, just to clarify the record,
15 Mr. Gibson's office -- and I believe it's only with me. If
16 I'm wrong I guess he could correct the record. But has
17 discussed generally the issue of authority, which it sounds
18 like we don't have to deal with, and this potential conflict
19 on a couple of occasions.

20 However, today is the first time I've heard anything
21 approaching an actual theory about what the conflict of
22 interest is. So I appreciate that we now have that on the
23 record. I've been told that it will be formally introduced to
24 it and we can deal with it. But that's the first I've ever
25 heard of what it actually is.

1 MR. GIBSON: I would take exception to that, Your
2 Honor.

3 THE COURT: Okay. Mr. Gibson, what further is
4 required before you can file the motion to disqualify?

5 MR. GIBSON: I'm sorry, Your Honor?

6 THE COURT: What further is required before you can
7 file the motion to disqualify?

8 MR. GIBSON: I want to finalize our further research
9 on that issue, Your Honor.

10 THE COURT: What does that mean? Is it a legal
11 research question?

12 MR. GIBSON: Yes, Your Honor.

13 THE COURT: Is it a factual research question?

14 MR. GIBSON: Yes, Your Honor. Legal research.

15 THE COURT: Legal research?

16 MR. GIBSON: Yes, Your Honor.

17 THE COURT: How soon can you file that motion?

18 MR. GIBSON: We can file that motion within two
19 weeks, Your Honor. Sooner if required. Assuming, of course
20 that our legal research concretely supports the views that we
21 appear to be heading down.

22 THE COURT: It will be the order of the Court then
23 that the plaintiff is to file that motion to disqualify
24 regarding Mr. Massi's participation in the case on or before
25 April 30, 2010, which is two weeks from today.

1 MR. GIBSON: Thank you, Your Honor.

2 THE COURT: The Court considers motions to
3 disqualify a significant matter to be brought before the
4 Court and always gives them a priority because of the
5 potential that it has to impact the litigation. Typically
6 once those are filed a hearing will be set, briefing will be
7 received, and then an appropriate action will take
8 thereafter.

9 Also, it's normal, when that motion's filed, that
10 it takes priority over everything else and essentially the
11 case is stayed at that point. And I think we will be able to
12 move forward in regard to a hearing as to any sanctions
13 arising out of this particular motion to compel today. But
14 other things may be in jeopardy. It would also potentially
15 impact your scheduling.

16 MR. GIBSON: Thank you, Your Honor.

17 THE COURT: All right. Anything further today?

18 MR. GIBSON: No, Your Honor.

19 THE COURT: Yes.

20 MS. IRSFELD: Yes, Your Honor, just --

21 THE COURT: That's okay.

22 MS. IRSFELD: -- a question to clarify. Would the
23 Court, along with Mr. Bowers' application for the Benessere
24 entities, would the Court entertain application by other
25 defendants who incurred significant fees of counsel, having

1 counsel attend the lengthy deposition?

2 THE COURT: Absolutely. I believe there was joinder
3 here --

4 MS. IRSFELD: Yes, there was.

5 THE COURT: -- of everybody.

6 MS. IRSFELD: And I just wanted to clarify because
7 you'd asked Mr. Bowers. Thank you.

8 THE COURT: Absolutely. And that was my intent.

9 MS. IRSFELD: Thank you.

10 THE COURT: Okay. Anything further today?

11 COUNSEL: No, Your Honor. Thank you.

12 THE COURT: Any chance of settling this case?

13 MR. GIBSON: Open for settlement, Your Honor. Open
14 for settlement discussions.

15 THE COURT: Has a demand been made by the plaintiff?

16 MR. GIBSON: I'm sorry?

17 THE COURT: Has a demand been made by the plaintiff?
18 I always look to the plaintiff.

19 MR. GIBSON: We did engage -- the answer is I
20 believe in the 26(f) conference that's required, settlement
21 discussions, we've advanced a construct for settlement that we
22 felt was very constructive. And the part -- the problem, Your
23 Honor, is that we're dealing with a lot of different
24 defendants.

25 THE COURT: Let me help you out, Mr. Gibson. It was

2:09-CV-1125-RCJ-RJJ Kabins v. Chain 4/16/10 Motions

1 a simple question. Have the parties had some discussion about
2 settlement? You said you're open to it. I said has there
3 been a demand by the plaintiff? Yes or no, has there been a
4 demand?

5 MR. GIBSON: In terms of that construct, no.

6 THE COURT: Okay. That's all I wanted to ask. It's
7 hard to get settlement discussions going when the defendants
8 never receive a demand from the plaintiff.

9 We'll be in recess.

10 THE CLERK: Please rise.

11 COUNSEL: Thank you, Your Honor.

12 THE COURT: Thank you.

13 PROCEEDINGS CONCLUDED AT 12:08:12 P.M.

14 * * * * *

15

16

17

18

19

20

21

22

23

24

25

2:09-CV-1125-RCJ-RJJ Kabins v. Chain 4/16/10 Motions

NW TRANSCRIPTS, LLC - Nevada Division
P.O. Box 890
Nampa, Idaho 83653-0890
(208) 466-4148 - gayle@nwranscripts.com

CERTIFICATION

I (WE) CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

**NW TRANSCRIPTS, LLC
NEVADA DIVISION
P.O. BOX 890
NAMPA, IDAHO 83653-0890
(208) 466-4148
gayle@nwtranscripts.com**

/s/ Gayle Lutz
FEDERALLY CERTIFIED MANAGER/OWNER

Kari Riley
TRANSCRIBER

4/25/10
DATE

2:09-CV-1125-RCJ-RJJ Kabins v. Chain 4/16/10 **Motions**

NW TRANSCRIPTS, LLC - Nevada Division
P.O. Box 890
Nampa, Idaho 83653-0890
(208) 466-4148 - gayle@nwtranscripts.com